No. 15131

In the

United States Court of Appeals

For the Ninth Circuit

STATES STEAMSHIP COMPANY, a corporation, *Appellant*,

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees*.

ATLANTIC MUTUAL INSURANCE COMPANY, *Appellant*,

v.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees*.

PACIFIC NATIONAL FIRE INSURANCE COMPANY, *Appellant*,

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UNITED STATES OF AMERICA, *Appellant*,

v.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees*.

THE DOMINION OF CANADA, *Appellant*,

v.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA, *Appellees*.

BRIEF OF APPELLANTS

Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company and The Dominion of Canada.

Appeals from the United States District Court for the District of Oregon

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JURISDICTION

This proceeding was commenced by the filing of a petition for exoneration from or limitation of liability by States Steamship Company as corporate owner of the SS PENNSYLVANIA. The petition was filed in the United States District Court for the District of Oregon.

The jurisdiction of the District Court was acquired under Rules 51-55 of the United States Supreme Court Admiralty Rules.

These appellants have appealed from that portion of the interlocutory decree of the District Court which limited their recovery to their proportionate share of the pending freight, and denied the full amount of their damages.

The jurisdiction of this Court was acquired under 62 Stat 929, 28 U.S.C.A. § 1292.

STATEMENT OF THE CASE

The SS PENNSYLVANIA on January 9, 1952, while on a voyage from the Port of Seattle, Washington, destined for the port of Yokohama, Japan, sank in the Gulf of Alaska at a position approximately 500 miles west northwest of Seattle, Washington. The vessel with all of her crew and cargo were lost.

The history of the vessel is briefly as follows: The vessel was a Victory ship built in 1944 by the Oregon Shipbuilding Company for the United States government. Between 1944 and January, 1951, the vessel was owned by the United States government and was operated in the Pacific area. During this period the vessel sustained numerous incidents of severe and extensive damage to its hull and frames due to heavy weather, collisions, and groundings. Repairs of these damages were made at times by complete replacement of the damaged plates, at other times by partial replacement of damaged plates and at times by merely restoring the old material to its original shape (Ex 147 and Tr 2391 through 2430 and 2439 through 2585).

By bill of sale effective February 17, 1951, the vessel was sold by the United States government to the States Steamship Company without warranty.

At the time States Steamship Company took title to the vessel it was provided with complete survey reports indicating past damages and repairs to the vessel.

Prior to its fatal voyage, the vessel, while owned and operated by States Steamship Company, made five voyages across the Pacific and back to the United States. On October 27, 1951, at the commencement of her Voyage 5, the SS PENNSYLVANIA sailed from the port of Long Beach, California bound for the Orient (Ex 69). During Voyage 5 on November 2, 1951, while proceeding in heavy weather with an air temperature of 54°, the vessel sustained a 22 foot crack in the main deck on the starboard side just forward of the midship house (Ex 44). On being advised of this crack by radio the States Steamship Company suggested to the Master by radio that he return to the closest and safest port, and the Master then proceeded immediately into Portland, Oregon (Tr 161).

The Head Operations Office of the States Steamship Company is located in Portland, Oregon (Tr 291-292). The Port Engineer and Acting Marine Superintendent of the Company, Mr. Lester Vallet, attended the vessel on arrival, surveyed the damage, prepared specifications for the repair of the damage and took complete charge of this repair operation (Tr 163).

The damage was also inspected by the American Bureau of Shipping and the Coast Guard, and the repairs were carried out by the Albina Engine & Machine Works (Tr 162). The vessel was not dry docked at this time, and only so much of the cargo was unloaded from the No. 3 hatch and from the deck of the vessel around the No. 3 hatch as was necessary to inspect and repair the 22 foot deck crack, and other damage in that *immediate area* (Tr 235 and 281). No tests of welds in the hull of the vessel or of other portions of the vessel except those in the immediate area of this damage were made by States Steamship Company at this time (Tr 268-269).

The 22 foot deck failure in the vessel sustained on Voyage 5 was classified as a Class 1 casualty, which has been defined by the Ship Structure Committee as one which has weakened the main hull structure so that the vessel is lost or is in a dangerous condition (Tr 1864-1865) or one where the strength of the structure is so weakened that it would be in imminent danger of further failure (Tr 2770). This was the first Class 1 casualty suffered by a Victory ship in over 2,000 ship years experience (Tr 2766 et seq). (The Ship Structure Committee was appointed by the Secretary of the Treasury and was comprised of representatives from the Navy Department, Bureau of Ships, the United

States Coast Guard, the United States Maritime Commission and the American Bureau of Shipping. (Tr 2734))

While the vessel was in Portland for these repairs on Voyage 5, it was discovered by a crew member of the vessel that the emergency steering gear was not working properly (Tr 344). This condition was personally investigated by the Marine Superintendent, Mr. Vallet, and it was discovered that cargo in the No. 5 hold in the nature of army blankets and clothing had entered in around the steering shaft and wrapped around the shaft so as to make it difficult to turn. The shaft was freed up by removing this clothing (Tr 217 and 344), and no other measures were taken to prevent a reoccurrence (Tr 372-373).

The vessel continued Voyage 5 by sailing to the Orient from Portland on November 14, 1951, and completed this voyage upon her return from the Orient to Seattle, Washington. At Seattle, the vessel was placed in dry dock at Todd's Shipyard for a scheduled routine annual underwater body inspection. The vessel was dry docked from 2250 hours on December 21 to 1615 hours on Decembr 22, 1951 (Ex 44) The Marine Superintendent and Port Engineer of States Steamship Company did not personally go to Seattle for this drydocking (Tr 178) but in his place sent his Assistant Port Engineer, Mr. Harve Brenneke (Tr 331). Under the op-

erational organization established by States Steamship Company, Mr. Harve Brenneke, as Assistant Port Engineer, had complete authority with regard to inspection and repairs of the vessel in the absence of Mr. Vallet (Tr 241). Mr. Brenneke limited his examination and survey of the vessel at Seattle to the underwater portions of the vessel (Tr 1718-1719). The vessel had carried cargo back from the Orient to Seattle on the return trip of Voyage 5 (Tr 2102), and this cargo remained in the cargo holds of the vessel during the entire dry-docking period (Tr 1161; Ex 44).

While the vessel was on dry dock, examination and surveys of the underwater body were conducted by the Coast Guard and the American Bureau of Shipping. Neither the Coast Guard representative (Tr 684) nor the American Bureau of Shipping Surveyor (Tr 769) received any special information concerning the vessel or instructions as to the type of inspection to be made either before or during their dry dock examination. The fact that the vessel had just suffered the first Class 1 casualty in Victory ship history was not disclosed to those who were to make the inspection.

On December 27, 1951, the vessel arrived at Vancouver, British Columbia (Tr 962). The lower holds of the vessel were prepared for the receipt of bulk grain, and its preparation included sealing off of the bilge

strainers in the lower holds with two layers of burlap (Ex 186, pp 6-10 and 22-23). After completing the loading of the grain cargo, the vessel departed from Vancouver on January 2, 1952, and returned to Seattle, Washington (Ex 44). The vessel arrived in Seattle on January 2, 1952, and docked at Pier 37 to load U. S. Army cargo (Tr 1165).

At some time prior to the vessel's arrival at Seattle, the States Steamship Company had offered certain space on the SS PENNSYLVANIA to the Army for carriage of Army cargo on Voyage 6 (Tr 2775). The space offered by the States Steamship Company included the entire deck space of the vessel (Tr 2130). This offering of space to the Army was the personal duty of Mr. Pitzer, the States Steamship Company Manager in Charge of the Operations Department.

On the basis of the space offered and the nature of the Army cargo to be shipped, the Army had prepared a prestowage plan (Tr 2117). The Army prestowage plan indicated that a cargo of corrosive acid in glass carboys, was to be stowed on the after deck in the wings of No. 5 hatch, and that a cargo of acetylene, in cylinders, should be stowed below deck (Tr 2120-2121 and 2128-2134). During the course of the loading of Army cargo aboard the vessel, the Master of the SS PENNSYLVANIA intervened and designated specific-

ally that the corrosive acid stowage location should be changed to the forward deck alongside No. 2 hatch (Tr 2686-2687). The acid cargo was stowed two tiers high alongside the No. 2 hatch (Tr 1004 and 991) and the acetylene was also stowed on the forward deck (Tr 117; 991).

At all times during the loading of the government cargo the States Steamship Company had in attendance aboard the vessel a regularly employed shore based supercargo, who was in charge of the loading of the vessel for States Steamship Company (Tr 1155-1156). The stowing of the corrosive acid on the forward deck was done sometime during the day of January 4, 1952 (Tr 1110, Ex 86). The supercargo reported the stowage of the acid in that location to the Seattle office of States Steamship Company on the day that it was so stowed (Tr 1166-1167).

In addition to the boxes of corrosive acid carried as deck cargo, the vessel carried on the forward deck twenty-six two wheel trailers (Ex 188). These trailers were stowed on the starboard side alongside No. 3 hatch (Tr 1005).

Crew members aboard the SS PENNSYLVANIA on Voyage 5 testified that the cross battens which were used to secure the forward hatches of the vessel were in a bent condition and as such were difficult to secure

and keep secure (Tr 2081-2082; 2094; 2100). There was no chafing gear aboard the vessel (Tr 307-308).

The vessel completed loading at Seattle for Voyage 6 on the morning of January 5, 1952, and cast off from Pier 37 shortly after 0800 on January 5th (Tr 739) for the Orient on what has been described as the Great Circle Route.

The Marine Superintendent of States Steamship Company knew that many of the Masters of the States Steamship Company decided to take the Great Circle Route when west bound to the Orient (Tr 238). In particular the custom of Captain Plover of the SS PENNSYLVANIA in his choice of the northern or Great Circle Route was known to the States Steamship Company (Tr 506).

The only evidence as to weather and sea conditions actually encountered by the SS PENNSYLVANIA is contained in the radio messages received from the vessel (Ex 127). The wind velocity reported by the vessel was a wind of Force 9, Beaufort Scale, with very high seas. Between January 8 through January 10, 1952, there were approximately 17 ships reporting weather conditions from the general storm area in which the SS PENNSYLVANIA was lost. The ships closest to the SS PENNSYLVANIA, which proceeded toward her for the purpose of attempting rescue, sustained no sub-

stantial damage. No vessel within the storm area other than the SS PENNSYLVANIA was lost, or even sustained major heavy weather damage. (Ex 135, p 44; Ex 123, pp 30 and 31; Ex 146(8), pp 47 and 48; Ex 47, pp 51 and 52; and Tr 1658).

The radio messages from the SS PENNSYLVANIA (Ex 127), establish these facts:

The vessel sustained a crack down the port side between frames 93 and 94;

The crack started in the sheer strake and ran down about 14 feet;

Sea water entered the engine room of the vessel through this crack;

The vessel sustained a failure or breakdown of its steering system and for a time the vessel was completely unable to steer by any method in heavy seas then existing;

If the crew could not fix the steering gear the vessel would need immediate assistance;

The vessel was taking water in No. 1 hold;

The deck cargo on the forward deck came adrift and was taking off the tarpaulins on the forward hatches, and the No. 2 hatch was open and full of water.

The significant radio messages from the vessel are set out in full context in Appendix A to this Brief.

Atlantic Mutual Insurance Company and Pacific National Fire Insurance Company had issued policies of insurance on substantial portions of the cargo and upon payment of the loss to the owner of the cargo became claimants to the proceeding. The Dominion of Canada was the owner of certain cargo lost with the vessel.

On January 23, 1952, the States Steamship Company, as owner of the SS PENNSYLVANIA, filed its petition for exoneration from or limitation of liability in connection with the loss of the vessel and its cargo. These appellants, being underwriters of certain cargo lost with the vessel, and The Dominion of Canada, filed their claims and answers. The case was tried between July 13, 1954 and August 10, 1954. February 10, 1956, the trial court entered its Findings of Fact and Conclusions of Law (Tr 72).

In summary, the Findings and Conclusions were as follows:

> The storm in which the SS PENNSYLVANIA was lost was not of such a magnitude as to constitute a peril of the sea;
>
> The proximate cause of the sinking of the SS PENNSYLVANIA was her own unseaworthiness;

The failure and difficulties outlined in the vessel's radio messages were factors of unseaworthiness, and the contributory factors proximately causing the sinking;

The vessel was unseaworthy by reason of these factors at the inception of her voyage;

The evidence was insufficient to show that the petitioner had used due diligence to make the vessel seaworthy at the inception of her voyage, but the evidence was sufficient to show that the unseaworthy condition of the vessel at the inception of the voyage was without the privity or knowledge of the petitioner.

On February 16, 1956, the trial court entered an interlocutory decree denying the petition for exoneration from liability but granting the petition for limitation of liability and limited the recovery of these appellants to their proportionate share of the vessel's pending freight.

The appeal herein is from that portion of the interlocutory decree which allows the vessel owner to limit its liability to the amount of the pending freight. The sole question so presented is whether or not the proven unseaworthy conditions of the vessel and the proven failures to use due diligence to discover and correct

those unseaworthy conditions were within the privity or knowledge of the managers and superintendents of the States Steamship Company within the meaning of the Limitation of Liability Act, 46 U. S. C. A. § 183.

SPECIFICATIONS OF ERRORS RELIED UPON

I. The District Court erred in making and entering its Finding No. VII, which reads as follows:

> "That the evidence is sufficient to show that the unseaworthy condition of the vessel at the inception of her voyage was without the privity or knowledge of petitioner, and the Court finds that the unseaworthy condition of the vessel at the inception of her voyage was not with the privity and knowledge of the petitioner."

II. The District Court erred in making and entering its Conclusion No. III, which reads as follows:

> "That the petitioner has proved that the unseaworthiness of the SS Pennsylvania at the inception of her voyage was without the knowledge or privity of the petitioner and is entitled to limit its liability to the value of the freight pending, which amount is set forth in the order of this Court, dated May 26, 1954."

III. The District Court erred under its Interlocutory Decree, dated February 10, 1956 and entered February 16, 1956, in granting the petition of appellant States Steamship Company for limitation of liability to the amount of the pending freight on the SS Pennsylvania on January 9, 1952.

IV. The District Court erred in failing to find that the unseaworthy condition of the vessel at the inception of her voyage was within the privity and knowledge of appellant States Steamship Company.

V. The District Court erred in failing to find and conclude that appellant States Steamship Company has failed to sustain the burden of proving that the unseaworthiness of the SS Pennsylvania at the inception of her voyage, resulting in the loss of the said vessel and all her cargo, was without the privity or knowledge of the said appellant.

VI. The District Court erred in failing to find and conclude that appellants, Atlantic Mutual Insurance Company, Pacific National Fire Insurance Company and The Dominion of Canada, are entitled to recover the full amount of its damages arising from the loss of cargo aboard the SS Pennsylvania,

and in failing to enter judgment and decree in favor of these appellants for the full amount of said damages with interest thereon, together with costs.

SUMMARY OF ARGUMENT

THE TRIAL COURT ERRED IN GRANTING THE PETITION TO LIMIT LIABILITY TO THE VALUE OF THE PENDING FREIGHT.

A. The Burden of Proving Lack of Privity was on the Vessel Owner, States Steamship Company.

B. The Burden of Proof is on the Vessel Owner, States Steamship Company, to Establish Lack of Knowledge or the Means of Knowledge on the Part of Its Superintendents as to the Vessel's Unseaworthiness.

C. Petitioner as Owner of the Vessel Did Not Undertake to Sustain its Burden of Proof Upon the Issue of Privity, but on the Contrary It Disregarded Limitation and Relied Solely Upon an Asserted Lack of Liability.

D. Privity or Knowledge of any Shoreside Manager or Superintendent who Supervised any Phase of the Business Out of Which the Loss Occurred is the Privity or Knowledge of the Corporate Owner.

E. Privity or Knowledge as to Any One of the Contributing Causes of the Loss is Enough to Prevent Limitation.

F. The Privity and Knowledge of the Vessel Owner has been Established with Regard to Unseaworthy Steering Equipment.

G. The Privity and Knowledge of the Vessel Owner has been Established with Regard to the Unseaworthy Hull of the Vessel.

H. The Privity and Knowledge of the Vessel Owner has been Established with Regard to the Unseaworthy Conditions Resulting in the Opening of Number 2 and 3 Hatches.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING THE PETITION TO LIMIT LIABILITY TO THE VALUE OF THE PENDING FREIGHT.

A. The Burden of Proving Lack of Privity Was on the Vessel Owner, States Steamship Company.

The burden of proof as to privity or knowledge under the Limitation of Liability Act, 46 U.S.C.A. § 183, is upon the petitioning shipowner. To be entitled to limitation of liability, the shipowner must

prove the negative proposition of the absence or lack of his privity or knowledge.

The CLEVECO, 59 F Supp 71 (D.C.N.D. Ohio E.D., 1944) affirmed 154 F2d 605 (6th Cir., 1946);

The SILVER PALM, 94 F2d 776 (9th Cir., 1937); 1937 AMC 1462;

The VESTRIS, 60 F2d 273 (D.C.S.D.N.Y., 1932); 1932 AMC 863;

The EDMUND FANNING, 105 F Supp 353 (D.C.S.D.N.Y., 1952); 1952 AMC 1147;

Benedict on Admiralty, 6th Ed., Vol. 3, p. 378.

B. The Burden of Proof is on the Vessel Owner, States Steamship Company, to Establiish Lack of Knowledge or the Means of Knowledge on the Part of Its Superintendents as to the Vessel's Unseaworthiness.

The decisions under the Limitation of Liability Act make it clear that actual knowledge of the unseaworthy conditions is not necessary to prevent a shipowner from limiting his liability.

The rule has been stated by this Court as follows:

> "In proceedings for limitation, the owner may not escape liability by giving the managerial functions to an employed person acting as its agent, whether the person be corporate or otherwise. So far as concerns privity and knowledge such an agent is its alter-ego." *The SILVER PALM*, supra, 94 F2d 776 (9th Cir 1937) at p. 780.

See also:

THE FRANCESCA, 19 F Supp 829, at p 833, (D.C.W.D.N.Y., 1937); 1937 AMC 1006:

"Knowledge means personal cognizance, or *means of knowledge* of which the owner is bound to avail itself * * *." (Emphasis supplied)

In Re Great Lakes Transit Corporation, 81 F2d 441, at p 444, (6th Cir., 1936):

"The statute does not require that knowledge be actual, it may be imputed if someone in charge for the owner had general authority to act for him, and *by the exercise of ordinary care could have discovered the fault*." (Emphasis supplied)

The ARGENT, 1940 AMC 508, at p 509 (D.C.S.D.N.Y., 1915):

"It would, however, be a very easy matter for an owner to shelter himself behind an actual ignorance if lack of personal knowledge always constituted a good defense to the extent of the protection accorded by statute. If lack of actual knowledge were enough, imbecility, real or assumed, on the part of owners, would be at a premium. Such assumption of ignorance would be peculiarly easy on the part of corporate owners. Corporate owners have of late years greatly multiplied, and it is accordingly found that the doctrine of imputed knowledge and imputed privity has grown to meet the demands of business.

"In this case I think it conclusively proven that no officer of the petitioning corporation knew that the Argent maintained an unlawful light but for the matter of that they did not know whether she maintained a light at all, they did not regard it as any part of their business to ascertain whether that humble vessel was complying with the law or violating it every day."

* * *

"As long ago as *Republic*, 61 Fed. 109, knowledge of what owners could have seen if they had looked was imputed to them. * * *"

Austerberry v. U. S., 169 F2d 583 at p 594, (6th Cir., 1948):

"* * * the burden was upon the appellee to show that it had no privity or knowledge * * *. To sustain the burden of proof that is imposed in cases like this it may be observed that it is not sufficient to show that operations and care of the vessel were placed in the hands of men of experience in such matters * * *."

C. Petitioner as Owner of the Vessel Did Not Undertake to Sustain Its Burden of Proof Upon the Issue of Privity, but on the Contrary it Disregarded Limitation and Relied Solely Upon an Asserted Lack of Liability.

Despite the burden of proof which rests throughout on the petitioner, we shall in subsequent portions of this brief demonstrate privity and knowledge on the

part of the vessel owner respecting the unseaworthy conditions which brought about the loss of the vessel.

Our approach to the subject of privity and the failure of petitioner to sustain its burden of proof on this issue is not simplified by the fact that petitioner at trial took the position that there was no liability, i. e., no unseaworthiness or faults on the part of petitioner and therefore there was no necessity of going into the question of privity. As petitioner stated in its trial brief, "We shall not discuss privity, except in the abstract." And again in its answering trial brief (in an unsuccessful attempt to invoke the defense of a Peril of the Sea), "You cannot, unless you are in the confidence of God himself be privy to a storm."

At the close of petitioner's opening statement one of its proctors represented to the Court that the substance of its case as reviewed to that point concerned the question of liability. It was admitted that if a lack of due diligence was shown (as was later found by the trial court) the burden would shift to the vessel owner to prove lack of privity or knowledge on the part of its "managing or executive officers", but petitioner did not expect to reach that point (Tr 125).

In acknowledging this burden of proof, petitioner recognized the well settled rule applied in *The CLEVECO*, supra, 154 F2d 605 (6th Cir., 1946) and

other admiralty decisions considering this issue. However, it appears that no serious attempt was made by petitioner to sustain this burden in view of its position throughout the trial that there was no liability.

This is borne out by the evidence presented by petitioner with the obvious purpose of supporting its petition for exoneration, which issue has been decided adversely to the petitioner.

At the close of petitioner's case in chief petitioner's proctor stated to the Court (Tr 1753):

> "And also on the second issue, that is privity, of course we reserve the right to go into that when the occasion arises."

In view of the record it is manifest that petitioner at the close of its case did not undertake to introduce *any* evidence to sustain its burden.

The evidence subsequently introduced by petitioner on rebuttal falls far short of constituting satisfactory or other type of evidence supporting lack of privity.

J. R. Dant, Vice President and General Manager of the steamship company (Tr 2618-2619), testified that neither he nor any other member of petitioner's Board of Directors participated in any direct manner in the operation of the company's vessels and at the time of the loss of the SS PENNSYLVANIA and in" * * * the

months prior thereto * * *", Mr. Vallet as Marine Superintendent was in complete charge of the upkeep, repair, maintenance and supplying of the vessel. Mr. Dant further testified that Mr. Vallet was in general charge of making inspections and repairs and it was not necessary for Vallet to obtain authorization from petitioner's Board to make extensive repairs to the vessel (Tr 2624).

This testimony of Mr. Dant has nothing to do with the question of privity except perhaps to confirm the very extensive control and authority vested in Vallet as Marine Superintendent. The evidence was conclusive that not only was Mr. Vallet in privity with the unseaworthiness, faults and defects which brought about the loss of the vessel but that Mr. Vallet's personal neglect and gross disregard for principles of safety occasioned the loss of this vessel and her entire crew. Mr. Dant as the titular head of the company, perhaps in a desire to absolve himself from all connection with this tragedy, attempted to place the blame on the Marine Superintendent but in doing so he actually established that Vallet's privity and knowledge and negligence should be imputed to the corporate vessel owner.

The testimony of William H. Pitzer (Tr 2774-2776) adds or detracts nothing from petitioner's position for

he merely stated that he was head of petitioner's operating department in charge of the handling of the cargo and preplanning the loading of the vessel. Aside from preplanned loading of the cargo, he testified that he had nothing to do with the laying out, loading, stowing, or lashing of the cargo in the SS PENNSYLVANIA. This testimony in no way refutes the privity and knowledge of Pitzer as to defects in the planning of the cargo stowage, or its loading, stowing, or lashing. As hereafter reviewed in this brief, individuals under Pitzer's direct supervision and control attended the loading, stowing and lashing of the cargo.

The testimony of these two witnesses represents the only effort in the entire record which can be in any way identified with petitioner's burden of proving lack of privity, knowledge or means of knowledge respecting unseaworthiness, faults and negligence. The weak character of such testimony, i. e., Dant and Pitzer, falls far short of the evidence required to sustain this burden of proof.

D. Privity or Knowledge of Any Shoreside Manager or Superintendent Who Supervised Any Phase of the Business Out of Which the Loss Occurred is the Privity or Knowledge of the Corporate Owner.

Since the owner of the SS PENNSYLVANIA is a corporation, the question arises as to which agents and

employees of the corporation are sufficiently high in the managerial echelons so their knowledge or privity will be attributed to the corporation and thereby defeat the corporate vessel owner's right to limit its liability. The general rule is stated in *Coryell v. Phipps*, 317 US 406, 87 L ed 363, 1943 AMC 18, where the court held that privity or knowledge of any shoreside "executive, officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred," is sufficient to destroy the vessel owner's right to limitation. See also *The SILVER PALM*, supra, 94 F2d 776 (9th Cir., 1937)

The following personnel of the States Steamship Company are managers or superintendents whose scope of authority in the various instances to be cited is sufficiently broad to constitute privity or knowledge of the corporation.

1. Mr. Vallet was acting in the dual capacity of Marine Superintendent and Port Engineer for the company. As Port Engineer he was in charge of all maintenance and repair of all vessels. As Marine Superintendent he was in charge of the Marine Department, which in addition to the maintenance and repair of the vessel was also charged with the obtaining of personnel and officers for the ships, maintaining discipline

on the vessels, and also operating and stowing the ships (Tr 140). In this position of complete authority, Vallet, without question, occupied a status in which his privity and knowledge must be attributed to the corporate owner for purposes of defeating limitation. As stated in *The CLEVECO*, supra, 154 F2d 605, (6th Cir., 1946) at p. 613:

> "Where a corporation is the owner of a vessel, the knowledge of the marine superintendent having general control and direction of its business is the knowledge of the corporate owner of the vessel. *Eastern S. S. Corporation v. Great Lakes Dredge and Dock Co.*, 1 Cir., 256 F. 497; and, within the section of the statute limiting liability knowledge means not only personal cognizance but also the means of knowledge—of which the owner or his superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it."

See also, *In Re Great Lakes Transit Corporation*, 81 F2d 441 (6th Cir., 1936);

In Re Jeremiah Smith & Sons, Inc., 193 F 395 (2nd Cir., 1911);

In Re New York Dock Company, 61 F2d 777 (2nd Cir., 1932).

2. Mr. Harve Brenneke, during the months of December, 1951 and January, 1952, just prior to the sail-

ing of the SS PENNSYLVANIA on its fatal voyage, was the No. 1 man under Vallet and carried the title of Assistant Port Engineer. In Vallet's absence Brenneke took Vallet's place and performed his duties (Tr 241). When the vessel was drydocked at Seattle, just prior to her departure on the fatal Voyage 6, she was attended by Mr. Brenneke. Vallet did not attend the vessel personally at this time, but in his place dispatched his Assistant to inspect the vessel and Mr. Brenneke was, accordingly, charged with complete authority over the vessel's inspection and any needed repairs at the conclusion of its Voyage 5 and prior to the commencement of Voyage 6. Under the decisions of the Admiralty Courts, this scope of authority clearly brings Brenneke within that group of corporate superintendents whose privity or knowledge will defeat limitation for the vessel owner.

As it was stated *In Re P. Sanford Ross*, 204 F 248 (2nd Cir., 1913), at p. 251:

> "The real test is not as to their being officers in a strict sense, but as to the largeness of their authority."

See also *POCONE*, 159 F2d 661 (2nd Cir., 1947), 1947 AMC 306, where the court held a corporation in privity with the negligence of a port engineer who

worked under a traffic manager, who in turn worked under the corporation's general agent. See also *The VESTRIS*, supra, 60 F2d 273 (D.C.S.D.N.Y., 1932)

3. Mr. William H. Pitzer was the head of the Operating Department for States Steamship Company in charge of the handling of the cargo (Tr 240, 2774), and had such authority that his privity and knowledge concerning any defective situation as to cargo or the planning of cargo stowage would constitute privity or knowledge of the corporation.

The EDMUND FANNING, supra;

Wilbur, et al v. Williams S. S. Co., 9 F2d 940 (D.C.N.D. Cal. S.D., 1925)

4. Mr. Paul A. Matson was in charge of the States Steamship Company's Seattle Operating Office (Tr 240. The States Steamship Company supercargoes, who were aboard the vessel supervising the loading of the cargo for the final voyage in January, 1952, made daily reports to Matson's office as to the details of the stowage of the cargo (Tr 1166). Under the cases cited above to establish the privity of the steamship company with regard to Mr. Pitzer, Matson's privity and knowledge must also be considered that of the corporation.

In *The EDMUND FANNING*, supra, the corporate owner was held in privity as to improper cargo stowage on the basis of knowledge of the unseaworthy conditions on the part of a shore captain at a port along the vessel's route, and again in *Wilbur, et al v. Williams S. S. Co.*, supra, limitation was denied because of knowledge of improper cargo stowage on the part of the ship owner's general agent, who supervised and approved stowage at the regular port of call.

The trial court found as a matter of *fact* that the *SS PENNSYLVANIA* was at the inception of her last and fatal voyage unseaworthy in many particulars which combined to cause the vessel's loss. The court also found as a matter of *fact* that petitioner as corporate owner of the vessel failed to exercise due diligence with respect to her unseaworthy condition. Based on such a finding the trial court necessarily denied the petition for exoneration, but held the corporate owner entitled to limit its liability upon a finding that it was not in privy with the unseaworthiness.

The evidence conclusively demonstrates that Vallet as Marine Superintendent — and as we have seen, the *only* supervisory employee who had charge of *all* phases of the vessel's care — had knowledge or means of knowledge of the unseaworthy condition in every respect as found by the trial court in entering

its initial finding of liability. We shall demonstrate that Vallet was personally guilty of neglect and default in sending and permitting the vessel to sail in a known unseaworthy condition.

The only possible premise on which the court could have granted limitation would be in our opinion based upon an apparent misapprehension that the privity and knowledge of the Marine Superintendent is not imputable to the corporate shipowner — a proposition which we have shown has been uniformly decided to the contrary by every admiralty decision which has considered the issue.

E. Privity or Knowledge as to Any One of the Contributing Causes of the Loss Is Sufficient to Prevent Limitation.

The trial court *found* that *all* of the difficulties mentioned in the radio messages, which comprise the dying declarations of the vessel, contributed to and caused her sinking, and found that all of the faults, failures, breakdowns and difficulties, together with the crack sensitiveness of the vessel to cold weather and heavy seas were factors of unseaworthiness which proximately caused the loss.

The rule is well established in admiralty that when more than one cause contributes to cargo damage or

loss, and the owner is responsible for only one of the causes, the owner to free itself from liability for the entire damage must carry the *severe burden* of proving exactly how much loss or damage was not caused by its wrongdoing. *The VALLESCURA*, 293 US 296, 79 L ed 373; *POCONE*, 159 F2d 661 (2nd Cir. 1947), 1947 AMC 306.

As a correlary to this rule: If several causes contribute to a loss and the owner is in privity with one or more of the causes, he must, to escape liability, carry what would be in this case the impossible burden of proving that the loss was not caused by any unseaworthiness with which he was in privity. This rule appears to be recognized by the court in *Lord v. Goodall Steamship Company*, 15 F Cas No. 8506 (Circuit Court D. Calif., 1877), at p. 887:

> "As used in the statute, the meaning of the words 'privity or knowledge', evidently is a personal participation of the owner in some fault, or act of negligence, causing *or contributing to the loss*, or some personal knowledge or means of knowledge, of which he is bound to avail himself of a contemplated loss, or of a condition of things likely to produce or *contribute to the loss*, without adopting appropriate means to prevent it." (Emphasis supplied)

F. The Privity and Knowledge of the Vessel Owner Has Been Established with Regard to the Unseaworthy Steering Equipment.

Radio traffic from the stricken vessel tells us—and the court so found — that she suffered a failure or breakdown of her steering system, as for a considerable period of time, buffeted by the storms and winds of a typical North Pacific winter storm, she was unable to steer by *any* method.

The pounding of the vessel by the severe storm when she was unable to steer compelled the court to find that the steering failures were factors of unseaworthiness proximately causing her sinking. The court also found that the evidence was insufficient to show that petitioner used the due diligence required by law to make the vessel seaworthy.

We shall now prove that failure of the steering systems rests upon the shoulders of one man—Vallet, the Marine Superintendent.

Since the vessel sustained failures of all steering systems, and for a time could not be steered by any method, it is necessary to examine the evidence relative to the emergency system as well as the main steering system. While the vessel was at Portland, Oregon for repair of the 22 foot deck crack sustained during Voyage 5 in November 1951, it was discovered that

the shaft of the emergency steering system was jammed where it passes through No. 5 hold. Such jamming was caused by a cargo of army blankets and clothing shifting against the shaft and entering in around the shaft so as to make it difficult to turn (Tr 169). Vallet personally inspected this unseaworthy condition, and testified that the only corrective measure taken was the removal of the cargo of clothing and blankets away from the shaft (Tr 169). No protective shield or guard was installed and no other action was taken to prevent a reoccurrence of this difficulty should the cargo shift again in the future (Tr 372). As he personally saw this defective condition and took charge of the sole correction made, it is thereby conclusively established that the lack of due diligence to permanently correct this unseaworthy condition in the emergency steering system was his *personal* negligence.

Turning to the main steering system, a review of the evidence establishes that the main steering system on the SS PENNSYLVANIA was a complicated combination of electric motors, moving parts, springs, hydraulic pumps, copper hydraulic tubing, etc. (Tr 677-680). Since the radio messages established that this steering system failed, the burden was then on the petitioner to show due diligence to maintain the entire system in seaworthy condition.

In connection with such critical items as steering equipment, stout, perfect ship's tackle is vital to safe navigation, and where failure of such items occurs, Admiralty has traditionally held the shipowner to the most *convincing* proof of due diligence.

Judge Augustus Hand has made a very able statement of the law in this field in *The WOODMANCEY*, 1925 AMC 1059 [reversed on other grounds, 18 F2d 79 (2nd Cir., 1927), 1927 AMC 628], at p. 1060:

> "Stout, perfect ship's tackle is vital to safe navigation and most convincing proof must be offered to sustain the defense of inevitable accident. * * * Care in looking after equipment and detecting defects which might render a tug helpless in dangerous waters should be established by completely convincing evidence. * * *"

Further illustration of the exacting standards of inspection and upkeep of steering equipment imposed on shipowners by the courts may be found in *The MEANTICUT-BEDFORD*, 65 F Supp 203 (D.C.S.D.N.Y., 1945), 1946 AMC 178, 188; *The PHOEBUS-MARAVI*, 70 F Supp 817, (D.C.S.D.N.Y., 1946), 1947 AMC 90; and *New York Marine No. 2*, 33 F2d 272 (2nd Cir., 1929).

In applying standards of inspection the time at which a thorough inspection of a vessel should be made

was recognized in *Union Carbide & Carbon Corp. v. The WALTER RALEIGH, et al*, 109 F Supp 781 (D.C.S.D.N.Y., 1951), [affirmed 200 F2d 908 (2nd Cir., 1953)] where the District Court aptly stated, at p. 792:

> "The rule as to inspections requires that the inspection be made before the vessel breaks ground. Seaworthiness of a part of the ship's equipment on the voyage just ended is not sufficient. Something might happen to the equipment while the vessel is in port. It may be because of this possibility that a proper inspection is supposed to be made prior to commencement of each voyage."

Faced with this heavy burden of proof in connection with the failure of the main steering system, the owner, in this case, knowing full well the vessel would by necessity traverse waters which tax the weathering qualities of a vessel to the utmost, where even a momentary failure of the vessel to steer might well be disastrous, failed to offer even one word of testimony to indicate that internal moving parts were ever inspected for wear during the entire history of the vessel.

The only evidence relative to the steering system was as follows: The U. S. Coast Guard inspectors conducted a dockside operating test of the main steering system in August, 1951, some five months prior to the fatal voyage. This dockside test consisted of turning the wheel in the pilot house and observing in the steering

engine room aft to see that the steering engine operated, and that the rudder indicators responded (Tr 658). During this same inspection period, in August, 1951, an American Bureau of Shipping Inspector also made an *external* examination of the steering parts. The Coast Guard inspector testified that the steering engine and the hydraulic pumps for the steering system were not opened up, and the internal parts were not inspected at the time of this August, 1951 inspection (Tr 689). A qualified Coast Guard Inspector testified that the Coast Guard does not require the opening up of the steering pumps on annual inspection but does require such an internal examination for the four year survey Tr 687).

It is significant that petitioner failed to introduce any evidence that such an internal examination had ever been conducted on the ship, for, notwithstanding an otherwise complete list of surveys which were made available at the trial, petitioner did not introduce even one four-year survey. We can therefore assume that no four-year survey was ever conducted and we can conclusively assume that the steering pumps were never internally inspected. How can the petitioner claim that it did not have the means of knowing that the steering pumps had not been inspected? The vessel was eight years old.

The only other evidence relative to the steering system concerned inspections of the steering gear made from time to time during Voyage 5 by the man on watch oiling the steering engine (Tr 351). It is clear from this testimony that these inspections were mere external observations of the visible parts of the engine at sea while the vessel was operating, and as the Court stated in *Warner Sugar Refining Co. v. Munson S. S. Line*, 23 F2d 194 (D.C.S.D.N.Y., 1927), at p. 197:

> "If a vessel owner is satisfied to rely on external appearances that the vessel and her appliances are in such good order that it is safe to take cargo on board, instead of making fair examinations and tests, the vessel owner assumes the responsibility for such defects as may exist and which a diligent examination would reveal."

There is no other evidence of inspection of the steering equipment, and there is no evidence of any inspection of internal parts of the steering engine or gears or equipment. There was no evidence of any maintenance or replacement of steering equipment during the entire history of the vessel.

An illustration of the failure of proof with regard to inspection and maintenance of the steering system may be found in an examination of the record relative to just one important part of this complicated system. The principal steering system is a telemotor system

consisting of heavy copper piping through which a non-freezing liquid, free of air, runs to bring pressure on rams and turn the rudder (Tr 678). This copper piping runs from the wheel house to the steering engine room (Tr 678). The distance from the bridge or wheel house to the steering engine room aft is 200 to 250 feet (Tr 659). There was, therefore, 200 to 250 feet of copper tubing which had to be air tight and leak free at all times, and there is not one word of testimony to establish that any part of that tubing, not even one inch thereof, was ever examined for wear, cracking or corrosion during the entire eight year history of the vessel.

From the foregoing, it is clear that the Court's finding of failure to prove due diligence to make the steering system seaworthy is unavoidable. Just as clear, however, the finding by the Court of no privity or knowledge on the part of the owner is erroneous. The finding of lack of due diligence on this point is based on a failure to prove any proper inspections or *any* inspection systems or maintenance programs.

Mr. Lester Vallet had complete charge of maintenance and repair on the vessel (Tr 140). Vallet, in all his lengthy testimony (Tr 138 through 316) failed to mention any program of periodic inspection or repair and replacement of parts relative to the steering equip-

ment. If he had testified that he delegated inspection of the copper tubing or the internal working parts of the steering equipment or pumps to some other person, then these appellants would have had an opportunity to cross examine and determine whether or not the delegated person was qualified, and to determine whether or not he had exercised due diligence in his delegation, *The ERIE LIGHTER*, 250 F 490 (D.C.D.N.J., 1918), but the proof did not even get to that point. Vallet did not even allege any delegation, and the responsibility therefore remains with him. The failure to inspect these parts or to have them inspected was his personal negligence, and his negligence is the negligence of his employer. *In re New York Dock Company*, 61 F2d 777 (2nd Cir., 1932).

G. The Privity and Knowledge of the Vessel Owner Has Been Established with Regard to the Unseaworthy Hull of the Vessel.

Another contributory factor responsible for the sinking of the vessel was a crack down the port side of the vessel between frames 93 and 94 starting in the sheer strake and running down about 14 feet through which sea water entered the engine room of the vessel. This defect was a factor of unseaworthiness which existed at the inception of the voyage, and the court found that petitioner failed to prove due diligence with

respect to this unseaworthiness. The failure to exercise due diligence to discover this defect was the personal failure of Mr. Vallet.

Vallet was the man in the States Steamship Company organization with such engineering knowledge and experience that he had knowledge or the means of knowledge as to this vessel's crack sensitiveness to low temperature and heavy weather.

At the time this vessel was purchased by States Steamship Company from the government, the complete past history of the vessel, including reports of serious and extensive damage to hull and frames, was made available to Mr. Vallet. Expert testimony introduced at the time of trial establishes the fact that when steel, of the characteristics used in the construction of the SS PENNSYLVANIA, is indented to any serious extent, the steel becomes subject to a condition known as "strain aging" (Tr 2427-2428). Once steel is strain aged, the temperature at which that steel will crack is a much higher temperature than before the strain aging occurred (Tr 2413-2414). Vallet was bound to know these facts, which were well known in the shipping industry prior to 1952, and were set forth in a publication entitled the "Welding Journal" as early as 1948 or 1949 (Tr 2438-2439). Vallet testified that he was familiar with the report of the Ship Structure

Committee (Ex 189) in connection with welded steel vessels, and had read this report prior to the sailing of the SS PENNSYLVANIA on Voyage 6 (Tr 209). This report contains findings of an expert body to the effect that serious fractures in welded steel vessels have usually occurred with low temperatures existing (Ex 185, p 9). This report further indicates that vessels which once have had a Class I casualty are more likely to sustain another Class I casualty (Ex 185).

It is admitted that the Voyage 5 fracture was a serious Class I casualty and Mr. Vallet, who alone in the managerial heirarchy of petitioner, had charge of inspection and repair of the vessel, felt that a thorough examination should be made of the vessel.

"Q. When there was a serious crack, then that meant to you, did it not, that a thorough examination must be made of that vessel?

A. Yes." (Vallet Tr 272).

Q. When it comes to making an inspection of a hull, and I am talking about a detailed inspection, you would require, first of all, I understand, Mr. Vallet, that the vessel be *completely unloaded?* (Emphasis supplied)

A. That is right.

Q. And it should be on dry dock?

A. For a complete inspection, yes.

Q. For a complete inspection?

A. Yes." (Vallet Tr 226)

Vallet also testified that a detailed hull inspection would involve going inside the vessel and examining *all the welds on the inside* (Tr 229). Vallet admitted testifying as follows in his deposition:

> "Q. How long would it take you to make a detailed and thorough hull inspection of the vessel?
>
> A. It would take about four or five days." (Vallet, Tr 227)

In his above testimony Mr. Vallet established a standard of care for inspecting the SS PENNSYLVANIA after she had sustained a Class I hull fracture during Voyage 5. However, no hull examination even approaching the standards prescribed by Vallet was made at the time repairs to the fracture were attempted during Voyage 5 or in the course of the drydocking at the conclusion of Voyage 5.

While the vessel was at Portland, Oregon for repair of the 22 foot crack in November, 1951, the vessel was not dry docked, and only so much cargo was removed from the No. 3 hold and No. 3 deck area as was necessary to repair and inspect the immediate area of the crack (Tr 235, 281). After this very limited inspection, Vallet sent the vessel to the Orient and back, and the next opportunity for a thorough inspection arose during the vessel's annual dry docking at Seattle in December, 1951.

Again the record demonstrates that Vallet failed to carry out his responsibility as the man in charge of maintenance and repair, and as the man who knew the significance and seriousness of the ship's prior Class I casualty. *He failed* to direct a thorough examination of the vessel's hull, although according to his own testimony, such an examination, conforming to specific standards prescribed by him, should have been made following the 22 foot deck plate fracture sustained on Voyage 5. *He failed* to attend the vessel in Seattle personally and gave his Assistant Port Engineer, Mr. Brenneke, no specific instructions for a thorough examination of the vessel. As a result, Mr. Brenneke limited the scope of his examination of the vessel to the usual routine underwater body examination which had been scheduled prior to the major deck plate fracture sustained on Voyage 5. The examination made by Mr. Brenneke was entirely without reference to or with consideration of the Class I casualty sustained on the voyage which the vessel had just concluded (Tr 1718-1719), although this was the first Class I casualty ever sustained by a Victory ship.

At the conclusion of its Voyage 5, the vessel was also examined, when dry docked in Seattle, Washington, by representatives of the American Bureau of Shipping and the U. S. Coast Guard for their own pur-

pose. However, prior to or during the time of their dry dock inspection, the inspecting personnel of these organizations had received no information concerning the recent Class I casualty to this vessel (Tr 684-685; 769). They were not advised of the serious damage sustained by the vessel on Voyage 5 or given any instructions or information which would guide and determine the extent of a hull inspection consistent with standards prescribed by Vallet.

It is obvious that the examinations by these representatives of other organizations could have no value for the purpose of relieving States Steamship Company's duty to exercise due diligence, particularly when vital information affecting the nature and extent of proper inspection was withheld from inspecting personnel.

The duty to exercise due diligence is to the vessel and not in the obtaining of certificates. *Bank Line, Limited v. Porter*, 25 F2d 843 (4th Cir., 1928); *The ABBAZIA*, 127 F 495 (D.C.S.D.N.Y., 1904); *The FELTRE*, 30 F2d 62 (9th Cir., 1929) and *The NINFA*, 156 F 512, 525 (D.C.D. Ore., 1907).

Furthermore, there is no indication that Vallet delegated inspection duties to these representatives of outside organizations as he testified that the company relied upon its own examinations (Tr 231 and 309).

Utterly no effort was made by Vallet, or his assistant Brenneke, to utilize the opportunity of the dry dock inspection at the conclusion of Voyage 5 as an occasion for a thorough inspection designed to determine the effect of the Voyage 5 Class I hull fracture upon the structural integrity of the vessel's hull, although this occasion was the last opportunity to provide the ship with the degree of inspection prescribed by Vallet's own standards prior to the vessel's departure on its fatal voyage.

Vallet's personal neglect in failing to inspect the ship is all the more glaring when we find that petitioner prior to the vessel's fatal voyage advertised (Ex 154-A, 154-B) an estimated time of arrival in the Orient which would have necessitated the Great Circle Route (where violent storms, low temperatures, and mountainous seas were to be anticipated) at an *estimated speed of fifteen knots* (Tr 1205-1206), or full speed ahead or top speed for a Victory ship. That Vallet should have known something was wrong with the vessel is borne out by a consideration of the weather conditions surrounding the Class I casualty on the preceding voyage. The air and sea temperatures were both relatively high, the air temperature being 54° F., the water temperature being 60° F. The weather conditions were not unusually severe and most certainly not as severe as the antici-

pated weather of the fatal voyage. Vallet knew "the highest incident of fracture occurs under the combination of low temperatures and heavy seas." See Design and Methods of Construction of Welded Steel Merchant Vessels, Section 8, finding (g), p. 9 (Ex 185) with which Vallet admitted familiarity. The reason for Vallet's refusal to have the vessel properly inspected at the conclusion of Voyage 5 is found in his own words (Tr 219 to 220):

> "Q. That is not my question. Were you or were you not in a hurry to get the vessel in and out of the dry dock at Todd's?
>
> A. No more than any other time.
>
> Q. I take it, then, that you are always in a hurry?
>
> A. That is—we are in the business of operating a ship with the least amount of delay.
>
> Q. That is right, just push them through?
>
> A. Sure."

In any search for other incipient cracks which might have resulted from the unusual stresses and strains placed upon the vessel during Voyage 5 when the 22 foot deck crack appeared, the most important place for examination was not the underwater portion of the ship. Mr. David Brown, an expert called by the owner, testified that the majority of cracks on the Victory type vessels occur in the main deck, which is the strength

deck within the midship portion of the vessel (Tr 2777). Brenneke, uninstructed as to the special and thorough examination required, testified that he confined his examination to the underwater body portion of the vessel (Tr 1717). There is no indication that Brenneke examined the decks or interior of the vessel in any way, or any portion of the hull above the water line.

To sum up the evidence supporting the trial court's findings of a lack of due diligence, as it applies to the hull inspections, the vessel was never given a thorough hull examination subsequent to the Class I casualty on Voyage 5 even according to Vallet's own standards. The vessel was never examined while fully unloaded since the evidence establishes that there was cargo on the vessel during the December, 1951 dry docking at Seattle, Washington. A completely unloaded vessel was one of Vallet's requisites for a thorough hull examination (Tr 226). Vallet also testified that for a detailed and thorough hull examination he would go inside the vessel and examine all the welds on the inside (Tr 228-229). Such an examination was never made subsequent to the Class I casualty of Voyage 5 and prior to the loss of the vessel, and it could not have been made with cargo spaces loaded.

The foregoing review of the evidence establishes that the lack of due diligence in hull inspections to detect

incipient cracks and defects was the personal negligence of the Marine Superintendent, Vallet. His position in this regard is exactly the same as the position of the marine superintendent in the case of *In Re New York Dock Company*, 61 F2d 777 (2nd Cir., 1932). In that case the marine superintendent failed to make a detailed inspection of the vessel involved and failed to require anyone else (as Vallet with respect to Brenneke) to make a detailed inspection. The corporate owner was held negligent due to the inadequate inspection, and since the inadequate inspection was the fault of the marine superintendent, the company was held in privity and limitation was denied.

If it be contended that Vallet delegated the hull inspection to Brenneke, it is first of all the contention of these appellants that his act of delegation and method of delegation constituted personal negligence since he failed to pass on to Brenneke his important special knowledge as to the significance and importance of the Class I casualty which had occurred on Voyage 5 and of the very thorough examination required thereby. The situation here is comparable to the situation in *The SILVER PALM*, supra, 94 F2d 776 (9th Cir., 1937) where this court held that the company could not limit liability where it delegated responsibility to the master without advising the master of special

circumstances which would have led him to act differently.

Secondly, it is the contention of these appellants that since Brenneke was the man in complete charge of maintenance and repair in Seattle in December, 1951, he occupied a position of sufficient authority so that his negligence in conducting a very limited examination of the hull must be attributed to the company and must be considered the privity and knowledge of his employer. The law establishing the privity of the company on the basis of personnel with authority similar to that of Brenneke has been discussed in prior portions of this brief.

In addition to the crack in the vessel between frames 93 and 94, the trial court found that the vessel was taking water in No. 1 hold. The evidence establishes that there was no deck cargo in the vicinity of No. 1 hold. Therefore, the entrance of water into No. 1 hold did not occur through a breaking of the hatch cover by deck cargo, as was the case at Nos. 2 and 3 hatches, and the water must have entered through some substantial break or leak in the ship's hull or deck in the vicinity of No. 1 hold.

This defect in the No. 1 hold has also been found by the trial court in Finding No. V to be one of the factors of unseaworthiness which caused

the sinking, and the same negligently limited hull inspection which failed to detect the unseaworthiness at frames 93 and 94 applies to the area of the No. 1 hold. Under these circumstances, the lack of due diligence was the negligence of Lester Vallet and Harve Brenneke and was within the knowledge and privity of the company as outlined above.

H. The Privity and Knowledge of the Vessel Owner Has Been Established with Regard to the Unseaworthy Conditions Resulting in the Opening of Number 2 and 3 Hatches.

Deck cargo on the forward deck came adrift and was taking off the tarpaulins on the forward hatches with the result that No. 2 hatch became open and full of water. This condition was one of the unseaworthy factors proximately causing the loss of the vessel. The trial court stated that the evidence was insufficient to show that petitioner used the due diligence required by law to make the vessel seaworthy at the inception of the voyage in this and other particulars.

Prior to the commencement of Voyage 6, cargo consisting of glass carboys of corrosive acid was stowed alongside Nos. 2 and 3 hatches on the forward deck of the SS PENNSYLVANIA. Mr. John D. Gilmore, an experienced Marine Surveyor with a background of exten-

sive sea experience, testified that when the vessel sailed for Voyage 6 in January across the North Pacific with a cargo of corrosive acid stowed adjacent to the No. 2 hatch, the vessel was unseaworthy. This opinion was corroborated by the testimony of two experienced sea captains, Captain Harry Johnson (Tr 2433-2434) and Captain Ulstad (Tr 2220). Richard A. Johnson (an expert witness called by petitioner—who held a Master's license) admitted that it was more dangerous to have *any* deck cargo on such a crossing (Tr 1750-1751).

The serious hazard of carrying deck cargo in the heavy seas to be anticipated in the North Pacific in January was known to the States Steamship Company. The logs of the vessel introduced into evidence (Exs 40-44) establish that on each of the preceding voyages of the SS PENNSYLVANIA, some objects on the deck of the vessel had broken loose, and caused damage (Tr 159, 189, 190, 191). (In fact Vallet stated that heavy weather damage happens "practically on all voyages" (Tr 191) to ships operated by States Steamship Company).

Carriage of the deck cargo on the fatal voyage was particularly dangerous due to the fact that the vessel was carrying bulk grain in the lower holds. Bulk grain is considered a dangerous cargo (Ex 59) which necessitates the most particular attention to security of the

hatches. For the carriage of this grain cargo, the bilge strainers had been secured with burlap (Ex 186, pp 6-10 and 22-23). With the bilge strainers so secured there was no way of pumping out water if it once entered the cargo hold (Tr 1220, Ex 59, p 42).

For this reason the standard publication, Modern Ship Stowage, (Ex 172) specifies additional precautionary measures to be observed in securing the hatches of a vessel carrying bulk grain in the lower holds. These measures include the use of chafing gear to prevent the cross-battens from wearing or cutting the tarpaulins on the hatches, which is to be anticipated even where the cross-battens are in good condition.

The publication, Modern Ship Stowage, has received general recognition and was referred to in *The NORTE*, 69 F Supp 881 (D.C.E.D. Pa., 1947), as a guide to the proper method of stowing a vessel. Despite these published instructions for stowage of bulk grain cargo, no chafing gear was furnished the SS PENNSYLVANIA on its fatal Voyage 6, and this omission constitutes another instance of Vallet's personal neglect which jeopardized the vital security of the forward hatches of this vessel.

With knowledge or the means of knowledge of the danger of carrying deck cargo under the above circumstances, Mr. William Pitzer, the man in charge of

cargo operations for the States Steamship Company, preplanned the cargo for Voyage 6, and offered space, including the entire deck of the vessel to the U. S. Army. The negligent deck cargo stowage plan was, therefore, the personal negligence of Mr. Pitzer, and as the man in charge of the operating department, his negligence constituted the knowledge and privity of the corporate owner in accordance with the decisions already cited in this brief.

In addition to the negligence in making the deck of the vessel available for any cargo at all, further acts of negligence were committed when the Army corrosive acid cargo was stowed on the forward deck of the vessel rather than on the after deck of the vessel as previously preplanned by the Army. This change of the cargo to the forward deck was ordered by the Master of the vessel, but knowledge of the forward deck stowage was not confined to the Master of the vessel since a regularly employed supercargo was aboard the vessel for States Steamship Company and testified that he reported this stowage to the Seattle office of the Company on the day that it was so stowed. This supercargo operated under Mr. Pitzer's supervision and direction (Tr 237) and was in charge for States Steamship Company "to see that the cargo is loaded the way we want it loaded."

Mr. Paul Matson was the man *in complete charge* of the Seattle office of States Steamship Company. Since this unseaworthy stowage of cargo was reported to him, he had knowledge of the condition, and his knowledge is likewise the knowledge of the company due to his *position of authority* in the Port of Seattle. See *Wilbur et al v. Williams S. S. Co.*, supra.

The States Steamship Company has attempted to deny knowledge and privity in connection with this unseaworthy deck cargo situation by seeking to establish that the final authority with regard to this rested with the Master of the vessel. However, Mr. Vallet has refuted that contention in his own testimony. See Tr 284 where Mr. Vallet states:

> "When the vessel is loaded and properly stowed and bunkered, we advise the master to that effect * * *"

It is well established that the improper stowage of articles which will imperil the safety of the ship if they come loose, renders a vessel unseaworthy. *The TITANIA*, 19 F 101 (D.C.S.D.N.Y., 1883); *The INDIEN*, 5 F Supp 349, affirmed 71 F2d 752 (9th Cir., 1934).

The rule with regard to the stowage of deck cargo is well stated by Judge Learned Hand in the *West Kebar*, 147 F2d 363 (2nd Cir., 1945), 1945 AMC 191.

In this case, Judge Hand, confronted with a situation almost identical to the deck cargo stowage in the present case stated, at p 365:

> "The consequence of any such break being so great the least care that could be demanded was that the cylinders should be made fast against all but the most unexpected and catastrophic storms, and such care the ship did not in fact bestow as the evidence proved."

The foregoing cases establish that the finding by the trial court of unseaworthiness in connection with the deck cargo which broke loose is well supported by the record. On the other hand, the finding of lack of privity or knowledge of the company in connection with this condition is clearly erroneous since Vallet admitted to his own control over cargo stowage (Tr 284), and the record establishes that the planning of the cargo for the deck of the vessel was the personal act of Mr. Pitzer, the man in charge of the cargo operations department for the company, and further the evidence establishes that the forward stowage of acid cargo was reported directly to Mr. Matson, *the man in charge* of the Seattle office.

A further important factor bearing upon the breaking open of the forward hatches was the defective condition of the cross battens, which constituted the secur-

ing devices designed to hold the tarpaulins on the forward hatches. Three seamen, who had served aboard the SS PENNSYLVANIA as members of the crew on Voyage 5, testified that the cross battens on the forward hatches were bent and buckled in such a manner as to make them difficult to secure and difficult to keep secured. See testimony of Alvin Huston, Ship's Carpenter (Tr 2081, 2082), Richard S. Brooks (Tr 2094) and Royce Cornwall (Tr 2100). Expert testimony established that a Victory ship sailing for a North Pacific voyage in January with cross battens that are in a bent condition so that they were difficult to secure and difficult to keep secure would be unseaworthy (Tr 2301, 2434).

In connection with these bent cross battens, the evidence establishes that a deck load of heavy timbers came loose and drifted around the forward deck of the vessel on Voyage 5 (Tr 2095, Ex 44). *The record fails to indicate that any inspection of the cross battens was made subsequent to that occurrence or that any replacement or repair of the cross battens was made subsequent to that occurrence.*

Vallet was aboard the vessel at Portland during Voyage 5 subsequent to the time when the timbers had come loose and drifted around the forward deck. There is no evidence that Vallet, or any assistant, ever in-

spected the cross battens on the forward hatches. When he dispatched Mr. Brenneke to inspect the vessel in Seattle, Washington at the conclusion of Voyage 5, Vallet admits that he gave Mr. Brenneke no special instructions, stating that Mr. Brenneke was fully qualified and knew what procedure to follow (Tr 270). There is, however, no evidence that Mr. Brenneke or any other personnel inspected the condition of the cross battens on the forward hatches at the conclusion of Voyage 5 or prior to the outset of Voyage 6, or that Mr. Vallet was not aware of this fact.

From authorities previously reviewed, it is clear that a ship owner cannot claim lack of knowledge or privity based upon the ignorance of supervisory personnel and arising from failure to inspect and observe conditions physically present to be seen. The defective condition of the cross battens would have been discovered by Vallet or Brenneke if they had undertaken *any* reasonable inspection of this equipment and such an inspection was a direct responsibility of Mr. Vallet and Mr. Brenneke. It is, accordingly, clear that both of them had the means of knowledge of the unseaworthy condition of the storm battens and that this condition was within the privity and knowledge of the corporate ship owner. It is likewise clear that States Steamship Company has completely failed to establish Mr. Vallet's

lack of knowledge or means of knowledge as to this defective condition.

It follows that the Company has completely failed to carry the decided burden of proof as to lack of privity with respect to the defective storm battens, particularly when Vallet knew that there was no chafing gear aboard.

CONCLUSION

We must again emphasize the well established principle that to be entitled to limitation, States Steamship Company must sustain its burden of proving a lack of knowledge or privity with respect to the unseaworthy conditions which the trial court has found existed on the SS PENNSYLVANIA at the inception of its fatal voyage, and which the trial court has held proximately caused her loss. These appellants, representing cargo interests aboard the vessel, are not required to prove a lack of knowledge or privity on the part of the shipowner.

It should be borne in mind that in finding liability on the part of the shipowner, the trial court has held that the vessel was unseaworthy in various particulars and that the shipowner failed to exercise due diligence to make the vessel seaworthy as to any of those particulars.

We have heretofore demonstrated that the failure of the shipowner to exercise due diligence in respect to each of the factors of unseaworthiness causing the vessel's loss was the personal default and negligence of the shipowner's Marine Superintendent and Port Engineer, Mr. Vallet, his Assistant Port Engineer Mr. Brenneke, and the other supervisory personnel, each of whom were executives of the shipowner vested with a high degree of responsibility in the company's management and operations. Without question (under the authorities we have reviewed) the privity and knowledge of these individuals and their lack of due diligence in respect to the vessel's unseaworthiness is to be imputed to States Steamship Company. Under these circumstances, to allow the Company to limit its liability for lack of privity or knowledge would place a premium on careless and indifferent corporate management.

It is the position of these appellants that the shipowner has completely failed to undertake or carry its burden of proving a lack of privity or knowledge or means of knowledge respecting the unseaworthy conditions found by the trial court to have caused the loss of the vessel and that for this reason alone the trial court erred in granting limitation of liability.

Nevertheless we are of the firm and sincere belief that the evidence most conclusively establishes the

existence of privity and knowledge on the part of the shipowner, imputed to it by reason of the knowledge, privity and negligence of executive personnel of the shipowner immediately charged with inspection, maintenance, repair and loading of the vessel.

Respectfully submitted,

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APPENDIX A

DISPATCHES

TIME OF RECEIPT SHIP	PCST	GMT	TEXT
0543	0643	1443	1400 GMT SS PENNSYLVANIA POSN 51.09 NORTH 141.31 WEST CRACK DOWN SIDE OF VESSEL DECK HALFWAY DOWN ENGINE ROOM PORT SIDE WIND WNW 9 VERY HIGH WESTERLY SEA VESSELS IN VICINITY PSE QRK AND QSL DE KWTC AR
0611	0711	1511	1400 GMT POSN 51.09 N 141.31 W CRACK DOWN SIDE OF VESSEL IN ENGINE ROOM BETWEEN FRAMES 93 AND 94 IN WELD STARTING IN SHEER STRAKE AND RUNNING DOWN ABOUT 14 FEET WILL TURN AROUND AS SOON AS POSSIBLE AND PROCEED SEATTLE
0629	0729	1529	1400 GMT SS PENNSYLVANIA POSN 51.09 NORTH 141.31 WEST HULL CRACKED 14 FEET DOWN PORT SIDE INTO ENGINE ROOM VESSEL TAKING WATER BUT CAN HANDLE WITH PUMPS IF SITUATION DOES NOT BECOME WORSE VESSELS IN VICINITY PSE KEEP CLOSE WATCH BT DE KWCT

0907	1007	1807	091730ZGMT 51.09 N 141.31 W ENDEAVORING TO STEER COURSE OF 110 DEGREES CANT STEER AT PRESENT TAKING WATER NR ONE HOLD AND ENGINE ROOM
0935	1035	1835	USE TURNBUCKLES TO HOLD CRACK IN COMPRESSION STARTING FROM DECK HEAD ADVISABLE TO DRILL END OF CRACK WITH AIR DRILL STOP WHAT ARE WEATHER CONDITIONS KEEP US INFORMED
1030	1130	1930	1905 GMT TAKING WATER NUMBER ONE HOLD DOWN BY HEAD CAN NOT STEER OR GET FORWARD TO SEE WHERE TROUBLE IS PUMPS HOLDING IN ENGINE ROOM IF WE CAN NOT FIX STEERING GEAR WILL REQUIRE ASSISTANCE VERY HIGH SEAS CAN NOT GET ON DECK AT PRESENT DECK LOAD ADRIFT TAKING TARPAULINS OFF FORWARD HATCHES CAN NOT GET ON DECK TO SECURE MASTER
1020	1120	1930	FOLLOWING RECD ON 500KCS QUOTE SOS SOS SOS DE KWCT KWCT KWCT BT SS PENNSYLVANIA AT 1920 LAT 51.09 N 141.13

			W TAKING WATER IN ENGINE ROOM AND NR 1 HOLD DOWN BY HEAD REQUIRE AID AR DE KWCT HW UNQUOTE
1052	1152	1952-6	POSN 49.10 N 142.35 W HAVE HIGH SEAS DID YOU GET ASSISTANCE YET AND WHAT YOU NEED
1107 1112	1207 1212	2007-9 2012	DO YOU WANT US TO RETURN AND STAND BY YOU? NO, YOU MAY PROCEED OTHER SHIPS CLOSER AND THANKS
1115	1215	2015	SOS PENNSYLVANIA 1920 GMT PSN 51.09 N 141.13 W . . TAKING WATER IN ENGINE ROOM AND NR 1 HOLD TARPS FWD HATCHES STILL HOLDING USING HAND STEERING . . NEED ASSISTANCE . . AR
1315	1415	2224	PENNSYLVANIA DISABLED AND FLOODED POSN 142.40 W 49.40 N IMMEDIATE ASSISTANCE (From QUEENS VICTORY Radio Log, Ex 128)
1345	1445	2245	DISABLED AND FLOODED ENGINE ROOM AND NO. ONE HOLD POSN 49.40 N 142.40 W . . QRM LAST PART (From QUEENS VICTORY Radio Log, Ex 128)

1504	1604	0004	GOT STEERING GEAR FIXED BUT CANT STEER AS RUDDER TOO FAR OUT OF WATER NR 2 HATCH OPEN AND FULL OF WATER LOOKS LIKE ONLY HOPE IS FOR WEATHER TO MODERATE
1522	1622	0022	LOOKS LIKE WE HAVE TO ABANDON SHIP
1527	1627	0027	45 PERSONS ABOARD AND FOUR BOATS
1530	1630	0030	LEAVING NOW